contract, but I think it is well established that in a mercantile contract where the words are partly printed and partly typed the typed words are to be looked upon as the better indication of the intentions of the parties.

The contract appears to me to contain all the *indicia* of a c.i.f. contract, and I hold that that is what it is.

I think there is no doubt on the authorities that under a c.i.f. contract a tender of the proper documents is essential and that the seller is not at liberty to tender the goods instead of the documents as was done in this case.

In my opinion, therefore, the plaintiff's claim that this was an out-and-out sale of goods by them to the defendants must fail, and there must be judgment for the defendants with costs.

Claim dismissed.

Solicitors : *Lee Thean-Chu; Pillai, Lim, Lee & Hwang.*

TAN AH LENG v. REG.

[A. Cr. J. (Rigby J.) September 17, 1956]

[Penang — Criminal Appeal No. 21 of 1956]

Societies Ordinance, 1949, ss. 11 & 14 — Membership of unlawful society — Presumption from tattoo marks — Rebuttal — Evidence.

Where a person is found with tattoo marks on his body indicating that he is a member of an unlawful society, the onus is on him to rebut the presumption under section 14 of the Societies Ordinance, 1949 that he is a member of that unlawful society.

The presumption under section 14 can be rebutted only by showing that whatever tattoo marks might be upon him he had no conscious knowledge that it was, in fact, the insignia of an unlawful society.

Case referred to :—

(1) *Sin Yat Chi v. R.* (1949) M.L.J. 117.

CRIMINAL APPEAL.

Triptipal Singh for the appellant.

P. G. Clough (Federal Counsel) for the respondent.

The facts appear sufficiently from the judgment below.

Rigby J. : — The appellant in this case, a young man aged 21, was charged with being a member of an unlawful society, contrary to the provisions of section 11 of the Societies Ordinance (No. 28 of 1949).

The particulars of the charge allege that he, on the 19th February, 1956, was a member of an unlawful society, to wit, the 36 Group Society, which is neither registered nor exempted under the provisions of the Ordinance.

He was convicted on the charge preferred against him and, according to the record, sentenced to pay a fine of $200 or two months' imprisonment in default of payment, and to six months' imprisonment.

He now appeals against both conviction and sentence. He was refused bail and has, in fact, been in custody since the date of his conviction, 19th June, 1956.

As to the matter of sentence. Either the offence, on its merits, warranted the imposition of a fine or it warranted a term of imprisonment. I find it difficult to appreciate the necessity for the imposition of a fine and imprisonment.

The facts of the case were briefly as follows :—

At about 8.40 p.m. the occupants of a police radio car were travelling along the Esplanade Road and when they were about in front of the Town Hall they saw two cyclists coming towards them from the direction of Light Street. They called upon them to stop. Why they called upon them to stop is not apparent. It may well be, of course, that they were simply cycling without lights. However, the cyclists failed to stop and rode off in the opposite direction. The Police gave chase and apprehended both cyclists. One of them was the appellant. They were searched and nothing found upon them. They were then taken to the Police Station. It was then found that the appellant had the tattoo marks of an eagle and a snake on his right shoulder. Hence this charge.

At the trial, Mr. Gee Kok Weng, a Senior Chinese Affairs Officer, Penang, gave an interesting discourse on the origin and history of Chinese secret societies both in China and in Malaya. He stated that the designs of a snake and an eagle, whether severally or jointly, were frequently used as tattoo marks of societies and that the tattoo marks of an eagle and a snake facing each other was the insignia of a tiger general.

The specific charge against the accused was that he was a member of the 36 Group Society. It is curious to observe that no question at any time was put to the witness linking — or endeavouring to link — the eagle and snake tattoo or insignia with the 36 Group Society until the witness had concluded his testimony. It was only then that, in reply to a question from the learned Magistrate, he said :—

"The tattoo mark on accused's right arm has triad significance. It belongs to the 36 group. It also belongs to the 108 Group."

Now the actual tattoo marks on the appellant's right shoulder consisted of an eagle and a snake and a tree stump — the snake was interwoven round the tree stump. The witness admitted that such knowledge as he possessed in these matters was primarily based on books and documents that he had seen and

read. He admitted that he did not remember seeing a tree stump included in the tattoos in the books he had read. He expressed the opinion, however, — and I quote from the record —-that "the tree stump might have been put to mislead or to make the tattoo more beautiful".

Section 14 of the Ordinance enacts that "where any ..... insignia of, or relating to, or purporting to relate to, any society are found in the possession of any person, it shall be presumed, until the contrary is proved, that such person is a member of such society, and such society shall be presumed, until the contrary is proved, to be in existence at the time such ..... insignia are so found". The learned Magistrate held, and I think rightly, that there was evidence before him in the form of the tattoo marks found on the appellant to indicate that he was a member of an unlawful society, to wit, the 36 Group Society, and accordingly called upon him for his defence.

The onus was, therefore, upon the appellant to rebut the presumption that he was a member of that unlawful society, to wit, the 36 Group Society. The only way in which he could rebut that presumption would be, of course, to show that whatever tattoo marks might be upon him he had no conscious knowledge that it was, in fact, the insignia of an unlawful society. Because it is, I think, quite clear from the authorities that conscious knowledge that the thing possessed in this case the tattoo marks — is the insignia of an unlawful society, is a necessary prerequisite to a conviction for an offence of this nature. (See *Sin Yat Chi v. Rex*[1]).

The appellant gave evidence that he had the tattoo marks — both on his right and on his left arm — done when he was in Singapore last year. He said he was shown a book in the shop where the tattoo was done and he chose that particular design — or those particular designs — from that book. He denied he was a member of any secret or unlawful society. In cross-examination he gave the following answers :—

"My tattoos were done in a shop. I did not call the tattooist because he is so far away. I do not know I can get him through the Police. I can point out the shop. I do not know the Police can pay the expenses of witnesses."

At the conclusion of his evidence the case was adjourned. I think it is quite clear from the answers which I have quoted above that the case was adjourned in order that the evidence of the appellant might be tested — one way or the other — by calling the tattooist who had made these tattoos. It is apparent that the case was, in fact, adjourned three times. Finally, the tattooist — an Indian — a tattooist by profession — was called from Singapore and brought before the Court. In his evidence he identified the tattoo and said it had been done by him. He further said that the tattoo on the right arm of the appellant was, in fact, the design in his book and that he was in the habit of showing that book of designs to customers for the purpose of enabling them to select what design they wanted. His evidence, therefore, to this extent, entirely corroborated the testimony of the appellant.

The learned Magistrate in his grounds of judgment deals thus with the defence :—

"The accused said that he is not a member of any society and that he got himself tattooed in a shop in Singapore and that the tattoo of an eagle and a snake was chosen from a book of designs.

Chandra Bhadur (D.W. 2), a tattooist from Singapore said that he recognised the tattoo on the right shoulder of accused as that done by him. He also said that the design was in his book of designs."

The learned Magistrate then quotes in his judgment section 14(1) of the Societies Ordinance, to which I have referred, and concludes his judgment with the words :—

"After considering the defence story I come to the conclusion that the accused has not rebutted the presumption placed on him".

Now it is settled law that where a statutory presumption is placed upon an accused person of proving or disproving a particular fact the burden of discharging that presumption is less than that cast upon the prosecution in proving a criminal charge beyond reasonable doubt. In this case it is difficult to see what other evidence the appellant could possibly have adduced in order to show that he had no knowledge that the tattoo marks upon him were — as alleged by the prosecution — the insignia of an unlawful society. Not only did he give evidence as to that fact himself but the tattooist was called from Singapore — and it is quite clear that the tattooist was not a preconceived and prepared witness as part of the case for the defence in the first instance — who corroborated his testimony that the design of the tattoo was a design contained in his book of tattoos and that he was in the habit of placing that book before his customers for them to select the tattoo marks that they desired. The learned Magistrate has made no attempt to analyse the defence story nor to set out the grounds upon which he considered that the defence had failed to rebut the presumption placed upon it. It is suggested on behalf of the respondent that it was purely a matter of

credibility and, that being so, the decision of the learned Magistrate ought not to be interfered with. It may well be that it was purely a question of credibility. But if that is so, I am of the opinion that some attempt ought to have been made by the learned Magistrate in his judgment to analyse the evidence and it is hardly sufficient merely to say: "After considering the defence story I come to the conclusion that the accused has not rebutted the presumption placed on him".

For these reasons I am of the opinion, and I so hold, that this appeal should be allowed. The conviction is accordingly quashed and the sentence set aside.

Appeal allowed.

PUBLIC PROSECUTOR v. YIAP TAI JUAN & ORS.

[A. Cr. J. (Buhagiar J.) October 2, 1956]

[J. B. — Criminal Appeal No. 27 of 1956]

Criminal Trial — Procedure to be followed in the case of co-accused who pleaded guilty.

In this case the eleven respondents and two others were charged with gaming in a common gaming house. The eleven respondents pleaded guilty while the other two co-accused claimed trial. The learned Magistrate heard the evidence against the two accused and then acquitted them as he found there was no evidence that the players were playing "open poker", which was the game they were alleged to have been playing. The learned Magistrate then proceeded to acquit those who pleaded guilty. The Public Prosecutor appealed against the order of acquittal as regards the eleven respondents on the ground that the learned Magistrate was wrong in law in acquitting them after they had pleaded guilty to the charge.

Held: (1) on the plea of guilty, the learned Magistrate could either have accepted the plea and sentence the accused or he could have refused to accept the plea and heard the case against them;

(2) in this case the respondents should have been tried before they could be acquitted.

Case referred to:—

(1) *R. v. Payne* 34 Cr. App. R. 43.

MAGISTRATE'S CRIMINAL APPEAL.

Bahaudin bin Yaacob (Federal Counsel) for the appellant.

Respondents in person.

Buhagiar J.: — The eleven respondents were charged, together with two others, in that on the 28th May, 1956, at about 10.15 p.m. at house No. 13A Seelong New Village, in the District of Kulai, they were found gaming in a common gaming house, to wit, "open poker" and that they had thereby committed an offence punishable under section 6(1) of the Common Gaming House Ordinance 1953. The eleven appellants pleaded guilty while the other two co-accused claimed trial. There was evidence to show that a game of cards had been going on; there was also evidence to show the nature of the game "open poker" but there was no evidence that the players were playing "open poker". On this evidence the learned Magistrate acquitted and discharged the two accused who had claimed trial. He also proceeded to acquit those who had pleaded guilty.

The Public Prosecutor appealed against the order of acquittal as regards the present respondents on the ground that the learned Magistrate was wrong in law in acquitting them after they had pleaded guilty to the charge.

There is nothing on the record to show whether the learned Magistrate accepted or not the plea of guilty. If he had accepted the plea then he should have convicted and sentenced them — the procedure to be followed in the case of co-accused who pleaded guilty is laid down in *R. v. Payne*[1]. If he had not accepted the plea then there should be a note of this on the record and the reasons for not accepting the plea and furthermore on rejecting the plea of guilty that in effect would amount to a claim to be tried and the eleven respondents should have been tried before they could be acquitted or convicted. It does not appear that there was any such trial.

I was about to make an order remitting the case for retrial when the learned Deputy Public Prosecutor informed me that in view of the nature of the evidence adduced by the prosecution against the other two co-accused he proposed to withdraw the charge; I, therefore acquitted and discharged the respondents.

Order accordingly.